



REPUBLIC OF KENYA



KENYA LAW
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**Ochieng v Republic (Criminal Appeal 177 of 2016)
[2022] KECA 479 (KLR) (11 March 2022) (Judgment)**

Neutral citation: [2022] KECA 479 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 177 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MARCH 11, 2022**

BETWEEN

SAMUEL ONYANGO OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kisumu
(E. N. Maina, J) dated 21st July, 2015 in HCCRA NO. 23 OF 2015)*

JUDGMENT

1. The appellant is serving a sentence of 15 years' imprisonment having been convicted of the offence of defilement contrary to section 8(4) of the *Sexual Offences Act*. His first appeal before the High Court was disallowed both on conviction and sentence. He is before us on a second appeal.
2. At plenary hearing, the appellant clarified that his appeal was against sentence only. In view of that, our role as a second appeal court is circumscribed by the provisions of section 361(1) of *Criminal Procedure Code* which reads;
361. Second appeals
 - (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section —
 - a. on a matter of fact, and severity of sentence is a matter of fact; or
 - b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.



3. Discussing this provision in regard to an appeal against sentence, this Court has in *Rotich v Republic* [1983] eKLR held;

“Under section 361(1) of the Criminal Procedure Code, an appeal lies only to this court on a matter of law, and severity of the sentence is expressly stated thereunder to be not a matter of law, but of fact, so we have no jurisdiction to enter into the question of the sentence in this appeal.”

4. It is common ground that the age of the victim was 17 years at the time the offence was committed. Under the provisions of section 8(4) of the *Sexual Offences Act* the minimum sentence for a person who defiles a child between the age of 16 and 18 is not less than 15 years and the sentence imposed by the trial court is undoubtedly lawful.

5. It seems to us that the appellant had hoped that we would, on the strength of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, review and reduce the sentence.

While we understand the rationale of that decision to be that judicial discretion in sentencing should not be inhibited by prescription of a mandatory sentence and by extension, at least to our minds, by a minimum sentence, we nevertheless, and despite the unease it causes us, defer to the Directions issued by the same Court on 6th July 2021 to the effect that the decision applies only to sentencing for the offence of murder under section 203 as read with section 204 of the Penal Code. Even if we are sympathetic with the plea by the appellant, we find ourselves unable to interfere with the sentence imposed by the trial court and affirmed by the High Court.

6. The appeal is accordingly dismissed.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

